

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SARAH J. HEFFLEY, JUDGE

DIVISION IV

CACR 06-169

RICKY L. SMITH

June 20, 2007

APPELLANT

APPEAL FROM THE CIRCUIT COURT
OF JEFFERSON COUNTY
[NO. CR 05-107-1]

V.

STATE OF ARKANSAS

HONORABLE BERLIN C. JONES,
JUDGE

APPELLEE

AFFIRMED

Although he was charged with first-degree murder, a jury in Jefferson County found appellant Ricky L. Smith guilty of second-degree murder, and he was sentenced to twenty years in prison. Appellant appeals this conviction and sentence, arguing that he was denied the right to a speedy trial; that the evidence is not sufficient to support the jury's verdict; and that the trial court erred by excluding evidence showing the bias of witnesses. We affirm.

On March 14, 2003, the nude body of Nicole Sharp was found in a ditch off Hardin-Reed Road in Jefferson County. Upon autopsy, the forensic pathologist determined that strangulation was the cause of death. There was also evidence that Sharp's hands had been tied because her wrists were clenched and bore ligature marks and bruising.

The initial investigation was conducted by the Jefferson County Sheriff's Department. Appellant was charged with first-degree murder in Sharp's death, and he was arrested on March 21, 2003. On October 1, 2003, the State nolle prossed the charge. After further investigation by the Arkansas State Police, the State refiled the first-degree-murder charge against appellant on January 28, 2005, and the case was set for trial on June 21, 2005.

On April 4, 2005, appellant filed a motion to dismiss contending that his right to a speedy trial had been violated. The trial court held a hearing on the motion on May 17, 2005, and the trial court denied the motion by an order entered on May 19, 2005.

On June 8, 2005, the trial court entered an order continuing the jury trial to July 27, 2005. In this order, the trial court ruled that the time between the two trial settings, June 21 through July 27, was to be excluded for speedy-trial purposes.

Although appellant did not raise his sufficiency challenge until the second point on appeal, double jeopardy considerations require this court to consider this issue first. *Standridge v. State*, 357 Ark. 105, 161 S.W.3d 815 (2004). The State's first witness, Betty McVay, began her testimony by admitting that she was a drug addict, a prostitute, and a convicted felon. She testified that on the night of March 13, 2003, she and fellow prostitutes, Brenda Abeyta and the victim Nicole Sharp, were in the company of appellant and James "Jimbo" Scoggin at the home of Scoggin's mother. She and the other two women were there to "trick off," meaning to provide sexual favors in exchange for drugs, namely crack cocaine. McVay said that things turned ugly when appellant accused Sharp of pilfering some of his drugs. She testified that appellant said, "B****, you took some of my drugs," and then "he went at her." McVay became frightened and ran out of the bedroom. She heard yelling and then saw Scoggin and Abeyta exit the bedroom, followed by appellant. According to McVay, appellant said, "I think I killed the b****."

McVay further testified that she saw Sharp's dead body and that Scoggin wrapped her in a curtain. Appellant told McVay and Abeyta to get Sharp's clothing, and Sharp was placed in the back of appellant's truck. McVay rode with appellant and Scoggin to dispose of the body. Afterwards, they drove to a deer camp where appellant and Scoggin burned the curtain and Sharp's clothing. McVay testified that she never saw Sharp's hands tied. She also admitted that she had not been truthful when she first spoke with the police.

Brenda Abeyta also testified that she prostituted herself for drugs and had previous felony convictions. She saw appellant murder Sharp. She recalled that she and McVay were giving appellant oral sex when Sharp walked by a dresser that had crack cocaine on top of it. She said appellant told Sharp to give him back his drugs in a mean voice. Even though Sharp denied taking appellant's drugs, appellant grabbed Sharp by the throat and held her against a wall until she collapsed. Abeyta saw the body being wrapped, but she said that Scoggin took her home and that she was not present when the body was dropped off. Abeyta said that Sharp's hands had not been bound. She also admitted that she had been less than candid with the police when first questioned because she was scared of the appellant, who warned her that she would end up the same way as Sharp if she told the police.

Jimbo Scoggin, also a convicted felon, testified that they were all at his mother's house getting high, but he denied having sex with any of the women. He said he did not see the murder take place, but he testified that appellant admitted he had killed Sharp. Scoggin testified he knew something was wrong when the girls came out of the bedroom hollering and screaming. When appellant exited the bedroom, he told Scoggin he thought he had "killed the b****." Scoggin testified that he took Abeyta home and expected appellant and McVay to be gone when he returned. As they were not, Sharp's body was wrapped in a curtain taken from his mother's extra bedroom,

loaded into appellant's truck, and taken to Hardin-Reed Road. He also testified that they drove to an abandoned deer camp, where they smoked more crack cocaine and burned the curtain and Sharp's clothes. Scoggin acknowledged that he had told the police a number of stories about the events of that night, but only for the sake of his mother, who was a long-time employee at the Jefferson County Sheriff's Office. Like McVay and Abeyta, he said that Sharp had not been bound.

There was no forensic evidence linking appellant to the crime. The tire tracks found near Sharp's body did not match the tires on appellant's truck. Although semen was found on Sharp, there was not enough for a DNA analysis. With McVay's help, detectives with the state police found a burn pile at a deer camp, as described by McVay and Scoggin. However, its contents could not be identified. There was also testimony that Scoggin's mother had given a friend several sets of curtains and that one set had a panel missing.

Appellant argues that the foregoing evidence is not sufficient to sustain a finding of guilt. He contends that there is no physical evidence connecting him with the commission of the murder and that the testimony of the witnesses was inconsistent and conflicting.

A person commits murder in the second degree if the person knowingly causes the death of another person under circumstances manifesting extreme indifference to the value of human life. Ark. Code Ann. § 5-10-103(a)(1) (Repl. 2006). In reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State and consider only the evidence that supports the verdict. *Watson v. State*, ___ Ark. ___, ___ S.W.3d ___ (June 24, 2006). We affirm a conviction if substantial evidence exists to support it. *Gorman v. State*, ___ Ark. ___, ___ S.W.3d ___ (Apr. 6, 2006). Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without resorting to speculation or conjecture. *Cluck v. State*, ___ Ark. ___, ___ S.W.3d ___ (Feb. 6, 2006).

When the evidence is viewed in the appropriate light, there was eyewitness testimony that appellant committed the murder. Although there were some aspects of the testimony that were inconsistent, reconciling conflicts in the testimony and weighing evidence are matters within the exclusive province of the jury, and the jury's conclusion on credibility is binding on this court. *Moore v. State*, 58 Ark. App. 120, 947 S.W.2d 395 (1997). We cannot say there is no substantial evidence to support the verdict.

Turning now to appellant's speedy-trial argument, appellant contends that he was arrested on March 23, 2003, and that the one-year, speedy-trial period had expired by the time the first-degree-murder charge was refiled on January 28, 2005. Further, appellant contends that the period of delay between October 1, 2003, the date the first information was nolle prossed, and January 28, 2005, the day the charge was refiled, is not excluded from the speedy-trial calculation because the State did not have good cause to nolle prosequere the charge.

Under Rule 28.1(c) of the Arkansas Rules of Criminal Procedure, a defendant must be brought to trial within twelve months, unless there are periods of delay that are excluded under Rule 28.3. If the defendant is not brought to trial within the requisite time, the defendant is entitled to have the charges dismissed with an absolute bar to prosecution. Ark. R. Crim. P. 30.1. Once a defendant establishes a prima facie case of a speedy-trial violation, i.e. that his trial took place outside the speedy-trial period, the State bears the burden of showing that the delay was the result of the defendant's conduct or was otherwise justified. *Yarbrough v. State*, ___ Ark. ___, ___ S.W.3d ___ (May 10, 2007).

At the speedy-trial hearing held on May 17, 2005, the State conceded that appellant made a prima facie showing of a speedy-trial violation but argued that the delay was legally justified. According to the State, there were 192 days chargeable to the prosecution for the period when the

speedy-trial period began to run¹ to the date the charge was nolle prossed. The State contended, however, that the 483 days between the nolle prosee and the refiling of the charge (October 1, 2003 and January 28, 2005) is excluded from the speedy-trial period. The State pointed out that 109 days had elapsed between the refiling of the charge and the date of the hearing, which when added to the previous 192 days, only 301 days had counted toward the one-year period, leaving sixty-four days to bring appellant to trial as of the time of the hearing. The State noted that the June 21, 2005, trial setting was within this sixty-four day time period.

The State premised its argument that the speedy-trial period was tolled between the nolle prosee and the refiling of the charge based on Ark. R. Crim. P. 28.3, which excludes from calculation:

(f) The time between a dismissal or nolle prosequi upon motion of the prosecuting attorney for good cause shown, and the time the charge is later filed for the same offense or an offense required to be joined with that offense.

The State further asserted it had good cause to nolle prosee the charge. The State maintained that the charge was filed in March 2003 based on the statements of Brenda Abeyta and Jimbo Scoggin. Although the State suspected that there was a third woman at the house the night of the murder, it had been unable to identify that woman. The State further explained that Scoggin recanted his initial statement that appellant had committed the murder in the weeks leading up to the first trial, leaving Abeyta as the only witness. Within a week, however, Scoggin took back his recantation somewhat and maintained a middle ground by saying that parts of his initial statement were true, but other parts were a lie. The State asserted that it nolle prossed the charge because it could not go forward with trial, given the uncertain state of the evidence. The State added that it

¹ The State began its calculation with March 21, 2003, the date the information was filed.

had not intended to forego investigating the murder and that the investigation was turned over to the state police. Under its direction, Betty McVay was developed as a witness, and the burn pile was found. With this additional evidence, the charge was refiled.

The trial court found that the lack of sufficient evidence provided good cause for the State to nolle prosequi the charge and that the State's dismissal of the charge was not done for the purpose of avoiding a speedy-trial deadline. Appellant argues on appeal that the trial court erred in finding good cause for the dismissal.

In *Carter v. State*, 280 Ark. 34, 655 S.W.2d 379 (1983), the State nolle prossed a murder charge against a mother when it learned that her daughter testified that it was she who killed her father. The State pursued delinquency charges against the daughter but determined that there was insufficient evidence to find her a juvenile delinquent. The State then refiled the murder charge against the mother, and the question on appeal was whether the State had good cause to request the nolle prosequi. The supreme court held that the State had good cause, noting also that there was no indication that the State had been seeking to evade the speedy-trial requirements.

In *Jones v. State*, 347 Ark. 455, 65 S.W.3d 402 (2002), good cause was found for taking a nolle prosequi when the State's only witness recanted his statement that the appellant had shot and killed the victim. The court held that the lack of evidence was good cause.

Based on the decisions in *Carter* and *Jones*, we are persuaded that the State had good cause for requesting a nolle prosequi based on the lack of sufficient evidence to proceed. The State was in a position where its witnesses were not of sterling character, there was no forensic evidence, and its case was substantially weakened by the vacillations in Scoggin's proposed testimony.

In addition to good cause, there also must be proof that the nolle prosequi was not used as a device to avoid a speedy-trial dismissal. *Jones v. State, supra; Caulkins v. Crabtree*, 319 Ark. 686, 894

S.W.2d 138 (1995); *Carter v. State*, *supra*. Here, there were over five months remaining on the speedy-trial period when the case was nolle prossed; thus, it cannot be said that the charge was dismissed to evade the speedy-trial deadline. In sum, we hold that the period between the nolle prosequi and the refile of the charge was excluded for purposes of speedy trial.

Appellant also contends that the trial court erred by excluding the period of time between June 21, 2005, and the continuance date of July 27, 2005. In its order, the trial court continued the case because its docket could not accommodate a multi-day trial on June 21. Appellant contends that the trial court's reason for continuing the matter does not constitute docket congestion. Although the record contains a letter in which appellant objected to a continuance, appellant did not make any argument in the letter that the delay should not be excluded from the speedy-trial period. At the outset of the trial, appellant renewed his previous motion to dismiss, but appellant made no argument with regard to the continuance and the trial court's exclusion of this time period. Hence, this issue is being raised for the first time on appeal. Appellant's failure to raise any objection and obtain a ruling precludes us from considering this issue on appeal. *Killian v. State*, 96 Ark. App. 92, ____ S.W.3d ____ (2006).

Appellant's final point concerns an evidentiary matter. He contends that the trial court erred by excluding testimony concerning the potential bias of witnesses on grounds of relevancy. Appellant argues that the State's prosecution against him was in retaliation for his filing suit against Jefferson County and county officers. He contends that he should have been allowed to show "that the police officers had an ulterior motive for making some of the allegations that had been made" and that the trial court's ruling prevented him from exposing their potential bias and motivation for their testimony.

We cannot reach the merits of this argument because appellant failed to proffer what the

testimony would have been. In order to challenge a ruling excluding evidence, an appellant must proffer the excluded evidence so that we can review the decision, unless the substance of the evidence is apparent from the context. *Leaks v. State*, 66 Ark. App. 254, 990 S.W.2d 564 (1999). The substance is not apparent here. We have no clue as to what “allegations had been made,” nor did appellant identify the witnesses or what he intended to ask them. Appellant also failed to disclose the nature of the civil lawsuit. The failure to proffer specific evidence renders a relevancy determination impossible, *Turner v. State*, 354 Ark. 541, 141 S.W.3d 352 (2004), and without a proffer we cannot ascertain whether appellant was prejudiced by the trial court’s ruling. *Rollins v. State*, 362 Ark. 279, ___ S.W.3d ___ (2005).

Affirmed.

PITTMAN, C.J., and ROBBINS, J., agree.

